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CASE NO. ___

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD L. DUGGER, *et al.*,

Petitioners,

v.

JACK STANLEY TOWNE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 24, 1990

QUESTION PRESENTED FOR REVIEW

DOES A FEDERAL COURT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 2254(a) TO CONSIDER A CLAIMED *MIRANDA* VIOLATION, WHERE THE CONFESSION SOUGHT TO BE SUPPRESSED WAS FREELY AND VOLUNTARILY OBTAINED UNDER THE FIFTH AMENDMENT; OR, AS SUGGESTED IN *DUCKWORTH V. EAGAN,* DOES THE RATIONALE OF *STONE V. POWELL* BAR RELITIGATION OF *MIRANDA* CLAIMS IN FEDERAL HABEAS PROCEEDINGS.

LIST OF PARTIES

The parties to the proceedings below were Petitioners, Richard L. Dugger, Secretary of the Florida Department of Corrections, and Robert A. Butterworth, Attorney General of Florida, and Respondent, Jack Stanley Towne.

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CASE NO. _____

IN THE

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October Term, 1989

RICHARD L. DUGGER, *et al.*,

Petitioners,

v.

JACK STANLEY TOWNE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Richard L. Dugger, *et al.*, respectfully pray for entry of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in *Towne v. Dugger,* Case No. 88-3938 (11th Cir. 1990).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 899 F.2d 1104 (11th Cir. 1990), and is reprinted in the appendix hereto, p. A-2, *infra.*

The decision of the United States District Court for the Middle District of Florida, Orlando Division has not been reported. It is reprinted in the appendix hereto, p. A-18, *infra.*

The decision of the Florida District Court of Appeal, First District of Florida, appears at *Towne v. State,* 495 So.2d 895 (1st DCA 1986). It is reprinted in the appendix hereto, p. A-32, *infra.*

JURISDICTION

Respondent Towne, pursuant to 28 U.S.C. § 2254, filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Orlando Division. The court on October 18, 1988 denied the petition. Respondent appealed the district court's order to the Eleventh Circuit Court of Appeals. The court on April 30, 1990 reversed the denial of the petition. The court on June 7, 1990 denied rehearing in the case.

The jurisdiction of this court to review the decision of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution, which provides in pertinent part:

> No person shall ... be compelled in any criminal case to be a witness against himself ....

Amendment XIV of the United States Constitution, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2254(a), which provides that the courts

> shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 4, 1984 Officer Gary Manning arrested Respondent Towne for loitering and prowling at an apartment complex near Towne's home. Police advised Towne of his *Miranda* rights at the arrest scene, and transported him to the police station. At the station, police again advised Towne of his *Miranda* rights. Before making any statement, Towne asked Officer Manning if he thought Towne needed a lawyer. Manning testified at the suppression hearing as follows:

> A. He asked me if I thought he needed a lawyer.
>
> Q. But he didn't say anything before that like, I think I am in a lot of trouble, I think I need a lawyer, I might need a lawyer, what do you think, officer?
>
> A. He basically asked me what —
>
> Q. He just said "officer, what do you think about whether I should get a lawyer?"
>
> A. Something to that effect, yes, sir.

(Exh. Vol. 5, p. 194)

Manning's response to Towne's inquiry was: "I believe you are the person I've been looking for for the past year." Manning then stated to Towne that he thought Towne's shoe

prints matched those of the suspect and that Officer Reddick was pretty sure that Towne was the same person Reddick had chased in a prior crime. Manning also told Towne that there was a witness who could identify the scar on Towne's hand.

Manning's initial interview with Towne began at 1:30 a.m. and lasted approximately 30 minutes. Detective Kramig arrived at approximately 2 a.m. Manning told Kramig that Towne had made incriminating statements regarding several rape and burglary cases. Kramig asked Manning to assist him in interviewing Towne. Before the interview began, Kramig reviewed the *Miranda* warnings in detail with Towne, going over each right individually with him. After reading and explaining each right, Kramig asked Towne if he understood the right, and had Towne so indicate by signing his name beside that right on a printed rights form. Thereafter, the officers questioned Towne. Towne confessed, and agreed to make two tape recorded statements. The state charged Towne with sexual batteries, aggravated batteries, aggravated assaults and armed burglaries in seven cases.

Following the suppression hearing, the state trial court denied Towne's motion to suppress, finding that his arrest was lawful and that his confessions were freely, knowingly and voluntarily given. Towne entered a negotiated plea of nolo contendere to two counts of sexual battery, and three counts of armed burglary, reserving his right to appeal the denial of the motion to suppress. The state agreed to nolle prosequi the remaining charges. The state and defense stipulated that the validity of the confession was dispositive of the case. On direct appeal, Towne argued that the trial court erred in finding that his arrest was lawful and that his confession was voluntary. The state appellate court affirmed the trial court, explicitly finding that Towne had not requested assistance of counsel during interrogation.

Towne v. State, 495 So.2d 895 (Fla. 1st DCA 1986), *rev. denied,* 504 So.2d 768 (Fla. 1987)

Towne filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court, raising three grounds for relief: 1) conviction obtained by use of a coerced confession; 2) conviction obtained by evidence acquired pursuant to an unlawful arrest; and 3) conviction obtained in violation of the privilege against compulsory self-incrimination. The district court denied relief on each ground, holding that: 1) there was record support for the state court's finding that Towne's confession was not coerced and was freely and voluntarily given; 2) *Stone v. Powell* [428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976)] precluded federal review of the Fourth Amendment claim; and 3) Towne's question to Officer Manning as to whether he should get a lawyer was not an equivocal request for counsel, and thus the subsequent questioning of Towne was permissible under *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981).

Towne appealed the district court's order to the Eleventh Circuit Court of Appeals. The court held that while Towne's confession was not coerced, and was freely and voluntarily given, Towne had made an equivocal request for counsel which Officer Manning failed to clarify, in violation of Towne's Fifth Amendment rights.

Petitioners sought rehearing, which the court summarily denied. Petitioners moved for stay of the mandate. The court issued orders staying issuance of the mandate to August 24, 1990.

REASONS FOR GRANTING THE WRIT

DOES A FEDERAL COURT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 2254(a) TO CONSIDER A CLAIMED *MIRANDA* VIOLATION, WHERE THE CONFESSION SOUGHT TO BE SUPPRESSED WAS FREELY AND VOLUNTARILY OBTAINED UNDER THE FIFTH AMENDMENT; OR, AS SUGGESTED IN *DUCKWORTH V. EAGAN,* DOES THE RATIONALE OF *STONE V. POWELL* BAR RELITIGATION OF *MIRANDA* CLAIMS IN FEDERAL HABEAS PROCEEDINGS.

A. Jurisdiction

Title 28 U.S.C. § 2254(a) provides that the courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." In order to meet the federal question prerequisite to habeas corpus jurisdiction, a prisoner must show that he is in custody in violation of the Constitution, laws or treaties of the United States.

Respondent Towne asserted in his habeas petition that his conviction was obtained in violation of the privilege against compulsory self-incrimination. That claim, based on an assertion that police failed to clarify Towne's equivocal request for counsel before obtaining a statement from him, was grounded in a violation of the prophylactic standards set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) and *Edwards v. Arizona,* requiring that once an accused requests counsel all interrogation must cease unless the accused reinitiates further conversation,

and extensions of *Miranda* and *Edwards* rules, requiring that when an accused makes an ambiguous or equivocal request for counsel, further questioning must be limited to clarifying the request. *See Owen v. Alabama,* 849 F. 2d 536 (11th Cir. 1988); *Thompson v. Wainwright,* 601 F. 2d 768 (5th Cir. 1979).

The Eleventh Circuit found that Towne's confession was freely and voluntarily given, but characterized the failure of police to clarify Towne's ambiguous or equivocal request for counsel as a violation of his Fifth Amendment rights. These rulings were a total misapplication of *Miranda, Edwards* and their progeny.[1] If Towne's confession was freely and voluntarily given, then the asserted failure of the police to clarify his ambiguous or equivocal request for counsel was not a violation of his constitutional privilege against compulsory self-incrimination. A violation of the Fifth Amendment occurs when one is compelled by governmental coercion to bear witness against oneself in the criminal process. *Colorado v. Connelly,* 479 U.S. 157, 163-164, and n. 1, 107 S.Ct. 515, 93 L.Ed. 2d 475 (1986); *See also Oregon v. Elstad* 470 U.S. 298, 306-310, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985)("The *Miranda* exclusionary rule ... serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."). While the failure by police to properly administer *Miranda* procedures may create an irrebuttable presumption of coercion, *Oregon v. Elstad,* no such circumstances were present in this case.

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1 The inconsistency in the court's ruling on the *Miranda* claim is highlighted by its ruling on Towne's Fourth Amendment claim that his confession was obtained by an illegal arrest. The court barred relitigation of that claim, on authority of *Stone v. Powell* and *Caldwell v. Taylor,* 461 U.S. 571, 103 S.Ct. 2015, 76 L.Ed.2d 33 (1983), (A-25, A-7) explicitly finding that regardless of whether the confession was the fruit of an illegal arrest, it was voluntary under the Fifth Amendment.

Police repeatedly advised Towne of his *Miranda* rights during interrogation, and Towne explicitly, unequivocably and repeatedly expressed his desire to waive his rights.

The rules set forth in *Miranda* and *Edwards* are not themselves constitutionally mandated, but are only judicially-created procedures designed to safeguard the accused's Fifth Amendment privilege against self-incrimination. *Miranda,* 451 U.S. at 526, 86 S.Ct. at 1602, 16 L.Ed. 2d at 694; *Oregon v. Elstad,* 470 U.S. at 306-10, 84 L.Ed. 2d at 232 ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."); *New York v. Quarles,* 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed. 2d 550,556 (1984); *Michigan v. Tucker,* 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); *Michigan v. Mosley,* 423 U.S. 96, 108, 96 S.Ct. 321, 46 L.Ed.2d 313, 324 (White, J., dissenting) (1975); *Solem v. Stumes,* 465 U.S. 638, 644, 104 S.Ct. 1338, 79 L.Ed. 2d 579,588 at n. 4 (1984) ("Like, for example, *Miranda* and *North Carolina v. Pearce* [cite omitted], *Edwards* did not confer a substantive constitutional right that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'").

Towne's claim, grounded, in fact, in a violation of the prophylactic standards set forth in *Miranda, Edwards* and their progeny, without any accompanying violation of the Fifth Amendment itself, cannot be characterized as meeting the jurisdictional requirement of 28 U.S.C. § 2254(a), and therefore is not cognizable on federal habeas corpus. In that jurisdiction may be raised at anytime, petitioners may raise this issue here.

The Eleventh Circuit decision fails to distinguish between the Fifth Amendment privilege against compulsory self-incrimination and the prophylactic *Miranda* rules. This court

should grant certiorari review and hold that a violation of the prophylactic rules of *Miranda,* without more, does not violate the Fifth Amendment privilege against compulsory self-incrimination, and a claim grounded in a violation of the *Miranda* rules does not meet the jurisdictional requirements of 28 U.S.C. § 2254(a).

B. Duckworth v. Eagan.

Justice O'Connor, joined by Justice Scalia, in a concurring opinion in *Duckworth v. Eagan,* 492 U.S. ___, 109 S.Ct. 2875, 106 L.Ed. 2d 166 (1989) opined that considerations of comity and the diminished deterrent value of the suppression remedy in federal habeas proceedings, when applied to exclude probative evidence as a result of *Miranda* violations, dictated that the rationale of *Stone v Powell* should be extended to bar relitigation of *Miranda* claims in federal habeas proceedings.

The majority in *Duckworth v. Eagan* reversed the grant of a petition for writ of habeas corpus, finding that technically defective *Miranda* warnings given by the police were not inadequate, and the defendant's confession therefore was not required to be suppressed. A footnote reference in the majority opinion noted petitioner's failure to argue that the rationale of *Stone v. Powell* should be applied to bar relitigation of the *Miranda* claim on federal habeas. *Duckworth,* 492 U.S. at ___, 106 L.Ed. 2d at 176, n. 3.

This case bears significant resemblance to *Duckworth.* Here, as in *Duckworth,* no doubt exists that the respondent prisoner is guilty of the offenses for which he was convicted. Here, as in *Duckworth,* the confession was determined to be reliable and wholly probative of guilt. Here, as in *Duckworth,* the asserted breach of *Miranda* procedure was not violative of the constitutional privilege against compulsory self-incrimination. Finally, here, as in *Duckworth,* the

grant of habeas relief on the *Miranda* claim occurred years after the commission of the offenses, and the asserted police misconduct, thereby offering little or no hope that the deterrent effect upon which *Miranda's* prophylactic standards are premised would be realized.

Where a claimed *Miranda* violation involves no intrusion upon the Fifth Amendment privilege against self-incrimination, and the evidence sought to be suppressed is reliable and probative of guilt, a stronger argument exists for application of the rationale of *Stone v. Powell* than in the context of the Fourth Amendment claims which that decision barred from federal habeas review. Unreasonable searches and seizures violate the Fourth Amendment itself. A violation of *Miranda's* prophylactic standards does not violate the Fifth Amendment, and evidence suppressed under *Miranda's* rules is often reliable and probative of guilt.[2]

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2 The lower federal courts in this case applied *Stone v. Powell* to bar relitigation of Towne's Fourth Amendment claim that his confession was the fruit of an illegal arrest. The Eleventh Circuit's refusal to extend the rationale of *Stone v. Powell* to bar relitigation of Towne's *Miranda* claim has led to an anomalous result: Towne was barred from pursuing his constitutional claim in the federal courts, but was permitted to relitigate his nonconstitutional claim.

Petitioners Dugger, *et al.*, in this case argued to the Eleventh Circuit, on authority of Justice O'Connor's concurring opinion in *Duckworth,* that the rationale of *Stone v. Powell* should bar relitigation of the *Miranda* claim in this case. The Eleventh Circuit rejected the argument on grounds that the state failed to present this issue to the district court. However, petitioner presented the *Duckworth* argument at the earliest possible opportunity.[3]

Application of *Duckworth* to this case is procedurally correct. This court's decisions have indicated that an opinion issued during the pendency of an appeal is properly considered in the resolution of that appeal. In *Sawyer v. Smith,*

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3 *Duckworth* issued June 28, 1989, eight months after entry of the district court's October 18, 1988 order denying the petition. Petitioners raised the issue in their supplemental answer brief, which the court ordered after appointing Towne counsel for purposes of his appeal. *Duckworth* had not yet issued when Petitioners filed their March 9, 1989 answer brief to Towne's *pro se* initial brief. Petitioners therefore raised the *Duckworth* issue at the first opportunity to do so. This Court in two prior opinions had left open the questions of whether relitigation of *Miranda* claims should be barred in federal habeas proceedings, and whether *Stone v. Powell* should be extended beyond Fourth Amendment claims. *See Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977)(barring consideration of a claimed *Miranda* violation on procedural default grounds, with Justice Rehnquist in the majority opinion noting that in the absence of argument by the state, the court would not consider whether a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession, is a proper subject for consideration on federal habeas review where a full and fair opportunity to review the question was afforded in the state courts) and *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977)(holding that the Sixth Amendment ruling of *Massiah v. United States* barred use of a confession obtained from an accused without a proper waiver of the right to counsel, with Justice Burger in a dissenting opinion asserting that *Stone v. Powell* should have been extended in that case). *Duckworth* therefore was the first decision in which members of the court asserted that the rationale of *Stone v. Powell* dictated that *Miranda* claims should not be cognizable on federal habeas corpus.

110 S.Ct. 2822 (1990), the court ordered supplemental briefing on an issue raised by *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989), decided after oral argument in the case. Application of *Duckworth* to this case, moreover, is supported by abundant federal case law holding that *Stone v. Powell* is to be applied retroactively. *See Jordan v. Estelle,* 551 F. 2d 612 (5th Cir. 1977); *Dupont v. Hall,* 555 F.2d 15 (1st Cir. 1977); *Bracco v. Redd,* 540 F. 2d 1019 (9th Cir. 1976). If *Stone v. Powell* is properly applied retroactively, then *Duckworth,* suggesting that the rationale of *Stone v. Powell* dictates that *Miranda* claims are not cognizable on federal habeas, also would properly be applied retroactively.

This case, involving an asserted breach of *Miranda* procedures unaccompanied by any infringement on Towne's Fifth Amendment privilege against compulsory self-incrimination, presents this court with ideal circumstances for extension of the rationale of *Stone v. Powell* to *Miranda* claims. Towne clearly was afforded a full and fair opportunity to litigate the *Miranda* claim in the state courts. The asserted breach of *Miranda* standards in this case did not go to the integrity of the fact-finding process; nor did it cast doubt on Towne's guilt. The confession suppressed by the Eleventh Circuit's ruling is undeniably reliable. Finally, application of the suppression remedy in this case six years after the commission of the offenses offers little hope that the rationale upon which *Miranda* and its progeny originally was based, that is, that police will be deterred from conduct which infringes upon a defendant's constitutional rights by application of the suppression remedy, will be realized in this case. For these reasons, the rationale of *Stone v. Powell* should be extended to bar consideration of the *Miranda* claim in this case.

CONCLUSION

Petitioners request this court, for the above stated reasons, to grant the petition for certiorari.

Respectfully submitted,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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August 24, 1990

Jack Stanley TOWNE,

Petitioner-Appellant,

v.

Leonard DUGGER, Bob Butterworth,

Respondents-Appellees.

No. 88-3938.

United States Court of Appeals, Eleventh Circuit.

April 30, 1990.

Prisoner was convicted in state court of battery, sexual battery, armed robbery and armed burglary. After exhausting state remedies prisoner petitioned for writ of habeas corpus. The United States District Court for the Middle district of Florida, No. 88-00502-CIV-ORL-18, G. Kendall Sharp, J., denied writ and prisoner appealed. The Court of Appeals, Clark, Circuit Judge, held that prisoner's question to officer "what do you think about whether I should get a lawyer," was an equivocal request for counsel requiring clarification before continuing interrogation, and failure to clarify required suppression of resulting confession.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS, Senior District Judge.

CLARK, Circuit Judge:

Petitioner Jack Towne was arrested at 1:00 a.m. on December 4, 1984 for loitering and prowling at an apartment complex near his home. The arresting officer, Officer Manning, questioned Towne at the police station about several rapes and burglaries that had recently occurred in the same area. When Towne made some incriminating statements, Officer Manning requested a detective to come to the station to talk to Towne. From approximately 2 a.m. until 5 a.m. Towne talked with Detective Kramig and Officer Manning and made the taped confessions that are the subject of this appeal.

Towne moved to suppress the taped confessions on the grounds that they were the fruit of an unlawful arrest, that they were coerced by promises of leniency and psychiatric treatment, and that they were obtained in violation of his privilege against self-incrimination. After a full evidentiary hearing, the trial court issued a one-page order denying the motion to suppress. The order announced no specific findings of fact, but found that the arrest was lawful and that the confessions were freely, knowingly, and voluntarily given. (Exh. F)

Towne subsequently entered pleas of nolo contendere to four separate charges of battery, sexual battery, armed robbery, and armed burglary, but reserved his right to appeal the denial of his motion to suppress. Towne was sentenced to twenty-two years imprisonment and is currently incarcerated. In his direct appeal, Towne argued that the trial court had erred in finding that the arrest was lawful and that his confession was voluntarily given. The state appellate court affirmed the trial court, and summarized the

evidence presented at the suppression hearing pertinent to the voluntariness of Towne's confession as follows:

> [Towne] was given the Miranda rights, both at the car at the time of the arrest, and again at the police station. [Towne] maintains that he asked to see a lawyer, and the arresting officer told him he could have an attorney but if he elected to go that route the officer would "throw the book at him." According to [Towne], the officer then told him he recognized that [Towne] had psychological problems. [Towne] said the officer told him he was a "new school" officer, that he was interested in helping [Towne] with his problems, that he would help [Towne] obtain release on his own recognizance, and that he would help [Towne] obtain probation. In addition, [Towne] maintains the detectives and the arresting officer told him that tape recording his statements would not only assist in a court proceeding, but could be used by a psychiatrist to determine the nature of his stress. [Towne] contends he trusted the officers and relied upon their representations.
>
> [T]he officers' version of the events surrounding the circumstances of [Towne's] incriminating statements differs from that of [Towne]. The officers note [Towne] was given his Miranda warnings not once, but several times, and he indicated he understood the rights available to him. The officers contend [Towne] did not request an attorney, and though the officers acknowledge the arresting officer promised to do everything he could to help, the discussions concerning offers of psychiatric help and promises to do everything possible to help him occurred in the context of the "entire realm of possibilities" attendant upon disposition of the

> case. According to the officers, these discussions occurred after [Towne] had made incriminating statements. The officers testified that no promises were given, and note that [Towne] read and signed a form waiving his right to consult an attorney.
>
> The psychiatrist appointed by the court to evaluate [Towne's] psychological status testified that at the time [Towne] talked with the investigators, he was primarily motivated by his desire to get help. The psychiatrist testified further that [Towne] was peculiarly susceptible to suggestions that psychological counseling could be made available to him. In the psychiatrist's opinion, [Towne] would not have confessed if he had not been promised psychological help.

Towne v. State, 495 So.2d 895, 897 (Fla.Dist.Ct.App.1986), *review denied,* 504 So.2d 768 (Fla.1987).

The State appellate court found that there was sufficient evidence on the record to support the trial court's implicit finding that any promises of psychiatric or other help were made *after* Towne confessed. *Id.* at 899. The appellate court also found that although it was clear that Towne had asked Officer Manning if he thought Towne needed a lawyer, he had not at any time explicitly stated that he wanted to have a lawyer. Therefore, the court held, the evidence supported the trial court's implicit finding that Towne had not requested a lawyer, and the trial court correctly ruled that his confession was not obtained in violation of the Fifth Amendment. *Id.*

Towne filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254 in federal district court on May 24, 1988. The petition raises three grounds for relief: 1) that his conviction was obtained by use of a coerced confession, 2) that his conviction was obtained by evidence acquired pur-

suant to an unlawful arrest, and 3) that his conviction was obtained in violation of the privilege against self-incrimination. The district denied relief on all three grounds, holding that 1) there was clear support in the record for the state court's finding that Towne's confession was not coerced and was freely and voluntarily given, 2) that *Stone v. Powell* [428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)] precluded federal review of Towne's Fourth Amendment claim that his confession was the fruit of an illegal arrest, and 3) that his question to Officer Manning was to whether he should get a lawyer was not an equivocal request for an attorney, and thus the subsequent questioning of Towne was permissible under *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

We are bound under 28 U.S.C. Sec. 2254(d) to afford factual findings of state appellate courts a presumption of correctness. *Sumner v. Mata,* 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Lindsey v. Smith,* 820 F.2d 1137 (11th Cir.1987), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1327, 103 L.Ed.2d 595 (1989) (State appellant court's factual determination from reviewing record of second trial that defendant had adequate substitutes for transcripts from first trial entitled to presumption of correctness in federal habeas corpus proceedings.) Findings of fact implicit in a state appellate court's decision are equally entitled to a presumption of correctness under section 2254(d). *See Williams v. Johnson,* 845 F.2d 906 (11th Cir.1988); *Sumner v. Mata,* 449 U.S. at 539, 101 S.Ct. at 764, 66 L.Ed.2d at 722. Nevertheless, although the state court's findings of fact regarding when promises were made, or what the petitioner said about wanting an attorney are entitled to a presumption of correctness, this Court must make its own determination of the voluntariness of the confessions after an independent review of the record. *Williams,* 845 F.2d at 909; *Agee v. White,* 809 F.2d 1487, 1494 (11th Cir.1987) (State court determination as to whether a certain statement was made is entitled

to a presumption of correctness under section 2254(d), but issue of whether statement implied a promise of immunity is subject to independent federal court determination.). Nothing in the record persuades us that the state appellate court's findings that promises were made to Towne only after he confessed and that he did not ask for an attorney explicitly, but did ask whether Officer Manning thought he should have an attorney, are not entitled to be presumed correct. Nevertheless, we must make an independent determination of whether Towne's confessions were obtained in violation of his constitutional rights.

Towne filed a *pro se* appeal in this Court, contending that the district court had erred in all three of its rulings.[1] Finding no errors in the district court's analysis of the first two issues, we adopt and affirm the portions of the district court's order in which it concludes that there was sufficient evidence presented at the state court suppression hearing to support the state court's conclusion that Towne's taped confessions were not coerced by promises of psychiatric or other help, and that Towne's Fourth Amendment claim that the confession was inadmissible because it was obtained after an illegal arrest is precluded under *Cardwell v. Taylor,* 461 U.S. 571, 103 S.Ct. 2015, 76 L.Ed.2d 333 (1983) (Extending rationale of *Stone v. Powell* to include custodial statements made after an illegal arrest). Dist.Ct. Manuscript Order, p. 6-10.

We cannot agree, however, with the district court's conclusion that Towne's Fifth Amendment rights were not violated

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1 Additonal briefs were filed by later appointed appellate counsel which contained arguments only pertaining to the district court's ruling that Towne's question to Officer Manning was not an equivocal request for an attorney. However, counsel did state in his brief that the brief adopted the petitioner's *pro se* arguments. Therefore, we consider all three issues raised by petitioner.

in this case. The Fifth Amendment requires that when a person requests an attorney during a custodial interrogation, all questioning must stop until an attorney is present, unless the defendant subsequently initiates conversation with the authorities. *Edwards v. Arizona,* 451 U.S. at 477, 101 S.Ct. at 1880, 68 L.Ed.2d at 378. This is a "rigid prophylactic rule", *Smith v. Illinois,* 469 U.S. 91, 95, 105 S.Ct. 490, 492, 83 L.Ed.2d 488 (1984), and courts are required "to give a broad, rather than a narrow interpretation to a defendant's request for counsel." *Michigan v. Jackson,* 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631 (1986). These principles apply equally whether the defendant's request is explicit or equivocal. *Owen v. Alabama,* 849 F.2d 536, 539 (11th Cir.1988); *Thompson v. Wainwright,* 601 F.2d 768, 771 (5th Cir.1979); *Nash v. Estelle,* 597 F.2d 513, 517 (5th Cir.) (en banc), *cert. denied,* 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979). "When a defendant makes an equivocal request for an attorney during a custodial interrogation, 'the scope of that interrogation is immediately narrowed to one subject and one subject only. *Further questioning thereafter must be limited to clarifying that request* until it is clarified.' Any statement taken by the state after the equivocal request for counsel is made, but before it is clarified as an effective waiver of counsel, violates *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)]." *Owen,* 849 F.2d at 539 (quoting *Thompson,* 601 F.2d at 771.). Therefore, as the district court noted, the threshold inquiry with regard to the waiver of the right to counsel is whether the right to counsel was in fact invoked.

The district court held that Towne's question to Officer Manning regarding whether Officer manning thought Towne should get a lawyer was not an equivocal request for and attorney. Our review of the record reveals the following about the circumstances surrounding Towne's taped confessions. Officer manning testified at the suppression hearing as follows:

Q. [By defense attorney] The subject [of seeing a lawyer] was brought up, wasn't it, before [Towne] made [the taped confessions] to you?

A. Yes, sir

Q. Who brought it up?

A. He did.

Q. Okay. How did he bring it up?

A. He asked me if I thought he needed a lawyer.

Q. But he didn't say anything before that like, I think I am in a lot of trouble, I think I need a lawyer, I might need a lawyer, what do you think officer?

A. He basically asked what—

Q. He just said "officer, what do you think about whether I should get a lawyer?"?

A. Something to that effect, yes, sir.

(Exh. Vol. 5, p. 194) No attempt was made by Officer manning or any other police officer to clarify or discuss in any way Towne's inquiry regarding getting a lawyer. Instead, Officer Manning concedes that he responded to Towne by making accusatory statements regarding the assault, burglary, and sexual battery offenses to which Towne later confessed. Specifically, after Towne asked Officer Manning about a lawyer, Manning said "I believe you are the person I've been looking for for the past year." He also told Towne that he though Towne's shoe prints matched those of the suspect and that Officer Reddick was pretty sure that Towne was the same person Officer Reddick had chased in a prior crime. Officer Manning also told Towne that there was a

witness who could identify the scar on Towne's hand. (Exh. Vol. 5, p. 195-97).

After this, Detective Kramig arrived. Officer Manning told Detective Kramig that Towne had made some incriminating statements regarding several rape and burglary cases (Exh. Vol. 6, p. 74). At this point, Detective Kramig asked Officer Manning to assist him in interviewing Towne. Before the interview began, Detective Kramig reviewed the *Miranda* warnings with Towne one by one. After each one, the detective asked Towne if he understood it, and had him indicate in writing that he understood. Thereafter the officers began to question Towne, Towne confessed and agreed to make the tape-recorded statements that are the subject of this habeas corpus petition. (Exh. Vol. 6, p. 25-38)

In ruling that Towne's question to Officer Manning did not amount to an equivocal request for an attorney, the district court reasoned that *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), was not intended to create an inflexible *per se* rule and, more specifically, was not intended to create a rule that courts must broadly construe questions suspects ask police officers to include an intention to invoke the right to counsel. Dist.Ct. Manuscript Opn., p. 15. Furthermore, the district court found that a common sense interpretation of Towne's question mandated a finding that he was not actually requesting counsel. This rationale is inconsistent with binding precedent in this circuit. Although these precedents do not establish a bright line rule for determining what sorts of statements amount to equivocal requests for an attorney, they do establish that questions such as the one posed by Towne are equivocal requests that require clarification before investigating officers initiate any further questioning.

For example, in *Owen v. Alabama,* 849 F.2d at 536, the suspect said to the officers, "I think I'll let y'all appoint me

one" while the officers were reading him the *Miranda* warnings. When they finished reading the *Miranda* card, the officers asked the suspect if he understood his rights, and he said he did. The suspect refused to sign a written waiver, but then gave an oral confession upon further questioning by the police. After the confession, the suspect said, "I want my lawyer now." The state argued that the totality of these circumstances indicated that the suspect's initial comment about having the police appoint him an attorney was not an attempt to invoke his right to have an attorney present during questioning.

The court held that the totality of the circumstances test, which is used to determine whether an accused has knowingly and voluntarily waived his *Miranda* rights, *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), has not role in the determination of whether an accused's request for counsel is clear or equivocal. *Owen,* 849 F.2d at 539. Furthermore, an accused's post-request responses to further interrogation may not be used to case doubt on the clarity of the initial request itself. *Id.* (citing *Smith v. Illinois,* 469 U.S. at 100, 105 S.Ct. at 495, 83 L.Ed.2d at 496-497.) The court ultimately held that the suspect's statement "I think I'll let y'all appoint me one" was an equivocal request for counsel that the officers had failed to clarify before the confession was obtained. Therefore, the confession was held to have been obtained in violation of the suspect's Fifth Amendment rights. *Id.* at 539-40.

Two former Fifth Circuit opinions, *Thompson v. Wainwright,* 601 F.2d at 768, and *Nash v. Estelle,* 597 F.2d at 513, also confront this issue.[2] In *Thompson,* the defendant was advised of his *Miranda* rights, signed a waiver, and then

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2 In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit made prior to the close of business on September 30, 1981.

stated that he wanted to tell his story to the police but he wanted to tell it to an attorney first. The police told him that if he talked to an attorney he wouldn't be able to talk to them, that his attorney would tell him not to talk, and that his attorney would not be able to tell them what he said. The defendant confessed without talking to an attorney. The court held that the defendant had made an equivocal request, and that the subsequent information provided by the interrogators did not serve to clarify the request. Therefore, the confession was obtained in violation of the defendant's Fifth Amendment rights. *Id.* at 771-72.

In *Nash v. Estelle,* 597 F.2d at 513, the defendant stated that he wanted to have an attorney appointed. The officer told him that they would have to stop talking if the defendant was going to talk to an attorney. The defendant then stated that he wanted to tell his story to the officer. The officer explained that the defendant could have an attorney right away, but if he got one the officer would have to stop talking to him immediately, and that if the defendant wanted to talk to him then and consult with an attorney later he could do that also. The defendant decided to talk to the officer prior to consulting with an attorney. The court held that under these circumstances the officer had properly narrowed his questioning to clarifying the defendant's request for an attorney, and thus the subsequently obtained confession was not obtained in violation of the defendant's Fifth Amendment rights. *Id.* at 520

Although these cases give a broad interpretation to the statements made by the defendant's in finding that they made equivocal requests for an attorney, none of them involve a question posed by the defendant, rather than an affirmative statement about exercising the right to consult with an attorney. However, the Fifth and Ninth Circuits have considered cases involving questions about attorneys posed by defendants. In both cases the court applied the

rationale of *Thompson* and *Nash* and found that the questions posed amounted to equivocal requests for an attorney.

In *United States v. Cherry,* 733 F.2d 1124 (5th Cir.1984), the defendant in a military murder investigation said "Maybe I should talk to an attorney before I make a further statement." The officer responded that the defendant had a constitutional right to advice of counsel. The defendant then asked "Why should I not get an attorney?" and the officer said that the attorney would protect the defendant's rights and would probably tell him to remain silent. The defendant next asked to speak to a sergeant, but was told that the sergeant couldn't be found. At that point another officer came in and told the defendant that other soldiers had said they had seen the defendant with the murder weapon. The defendant spontaneously confessed. The court held that the defendant had made an equivocal request for an attorney and his Fifth Amendment rights had been violated because the officers did not narrow their interrogation to clarifying whether the defendant wanted a lawyer before going any further. Id. at 1131.

In *United States v. Fouche,* 833 F.2d 1284 (9th Cir.1987), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988), the defendant asked to be allowed to call an attorney. He left the room, and instead called his wife. Upon returning, the officer again advised him of his rights. The defendant told the officer that he had not called an attorney, but had called his wife and she had told him to do whatever he wanted to. He then asked the officer, "What should I do?". The officer told him he wasn't an attorney and he couldn't give him advice. The officer then asked him, "Do you want to make a statement?" and the defendant said he did. The court held that the defendant had made an equivocal request for counsel, but that his Fifth Amendment rights had not been violated. The court reasoned that the officer's failure to specifically ask the defendant if he wanted a

lawyer was not error, in that the *Nash* decision does not require a "mechanical and talismanic repetition of the word lawyer" when *Miranda* warnings have been given twice in great detail and the suspect has understood his rights. *Id.* at 1289.

The question posed by Towne is similar to those posed by the defendants in *Cherry* and *Fouche*. In *Cherry* the defendant said "Maybe I should get an attorney" and then asked, "Why should I not get an attorney?". The defendant in *Fouche* asked to be allowed to call an attorney, but returned to the room and told the officer he had called his wife instead, and then asked "What should I do?". Thus, in both cases, as in the present case, the interrogating officer was asked by the defendant for advice as to whether the defendant should exercise his right to get an attorney. Such questions reveal to the interrogating officer that the defendant is contemplating exercising his right to have an attorney present, and under the rule established in *Nash* and *Thompson*, the officer should clarify the defendant's wishes before proceeding further.

In *Owen, Thompson, Nash, Cherry, Fouche* and in the present case, a suspect made an ambiguous statement, either in the form of an assertion or a question, communicating a possible desire to exercise his right to have an attorney present during questioning. There is no doubt that in each case, including the present one, the law enforcement officer understood that the suspect was talking about consulting with an attorney. To hold, as the district court did, that a suspect must give "a more definite indication of his desire to have counsel" than that given by Towne's question would undermine the principles behind the holding in *Thompson* that equivocal requests must be clarified before interrogation may continue. This clarification rule is designed to preserve the *Miranda* protections where an accused give ambiguous, vague, indefinite, or indecisive

signals that require follow-up questioning to clarify his or her wishes. If, as the district court held, equivocally invoking the right to counsel requires a defendant to make "a more definite indication" at the outset, only requests that are facially unequivocal will ever pass muster. Therefore, we hold that the question posed by Towne to Officer Manning amounted to an equivocal request for counsel that required that further questioning be limited to clarifying whether Towne wanted to consult with an attorney before continuing with the interrogation.

The state argues that even if Towne's question was an equivocal request for an attorney, Detective Kramig's subsequent careful repetition of the *Miranda* warning and Towne's signing of a waiver of rights form served to clarify the request. The state concedes that after a defendant makes an equivocal request for an attorney, merely asking if the defendant understands the *Miranda* warnings that were read to him earlier is not enough to clarify the defendant's desires to speak with an attorney. *United States v. Porter,* 764 F.2d 1 (1st Cir.1985). However, the state argues that in the present case the officers did much more than merely ask if Towne understood his rights. Instead, they repeated them one by one, pausing after each to ask if he understood, and having him indicate in writing that he did. Thus, the state argues, the officers followed the *Porter* court's mandate that they "make sure that the accused, knowing his rights, voluntarily relinquishes them." *Id.* at 7.

However, in *Cervi v. Kemp,* 855 F.2d 702 (11th Cir.1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1172, 103 L.Ed.2d 230 (1989), this Court held that the signing of a waiver statement after a request for counsel is not a valid waiver. The court found that when the defendant clearly requested an attorney, but then signed a statement waiving his *Miranda* rights before confessing, the waiver was not a valid waiver under *Edwards v. Arizona.* The court based its decision on

the clear mandate of *Edwards,* in which the Supreme Court held that once the defendant has requested counsel, all questioning must stop, and confessions obtained by further police-initiated questioning are obtained in violation of the defendant's Fifth Amendment rights. *Cervi,* 855 F.2d at 705-06. Therefore, because Towne made an equivocal request for an attorney that was never clarified, and did not initiate the further interrogation, the confession was obtained in violation of Fifth Amendment rights.

The state argues that the present case is similar to *United States v. Gonzalez,* 833 F.2d 1464 (11th Cir.1987), in which the court held that informing the defendant of her rights after she made an equivocal request for an attorney was sufficient to clarify her request. In *Gonzalez,* the defendant turned herself in to law enforcement officers. When she arrived, she stated that she had been out looking for an attorney, but had found that it was too expensive to have one with her when she surrendered. The officers read her the *Miranda* warnings, and then interrogated her and she confessed. The court held that this case was "near the boundary between an implied waiver of counsel and an ambiguous request for counsel." *Id.* at 1466. The court further held that "any ambiguity in her statement about her inability to retain counsel was resolved by her failure to request counsel ... after receiving the Miranda warnings and proceeding with her confession." *Id.*

We find that the present case is distinct from *Gonzalez.* In *Gonzalez,* the officer's subsequent reading of the *Miranda* warnings served to clarify the misperception indicated by the defendant's statement that it was too expensive for her to have an attorney accompany her to turn herself in. Specifically, the statement "If you would like to have an attorney present during questioning and cannot afford one, one will be appointed for you" served to clear up the defendant's misunderstanding that she had to provide her

own lawyer during questioning. In contrast, Officer Manning and Detective Kramig admit that they did nothing to clarify whether Towne wanted to have an attorney present. They did not, as the officer in *Nash* did, seek to explain that Towne could talk to them then without a lawyer, but could consult with one later. They also did not, like the officer in *Fouche,* tell Towne that they could not give him legal advice and that it was up to him to decide. Instead, Officer Manning further intimidated Towne by making accusatory statements, much as the officer in *Cherry* further intimidated the defendant by telling him that other soldiers had seen him in possession of the murder weapon.

The state and Towne have stipulated that the state trial court's initial ruling on the validity of Towne's taped confessions is dispositive of this case. Therefore, because we find that the confessions were obtained in violation of the petitioner's Fifth Amendment rights, the district court's denial of the petition for habeas corpus relief is REVERSED.[3] The case is remanded with instructions for the district court to grant the writ conditioned upon the state's right to try the defendant within a reasonable time as fixed by the district court.

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3 Citing Justice O'Connor's concurring opinion in *Duckworth v. Eagan,* ____ U.S. ____, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), the state also argues for the first time on appeal that this Court should extend the ruling of *Stone v. Powell* to preclude federal habeas corpus review of claims of *Miranda* violations. As this argument was not presented to the district court, it is not properly before us on appeal. Furthermore, two panels of this Court have previously declined to extend *Stone v. Powell* in this manner. *DeAngelo v. Wainwright,* 781 F.2d 1516 (11th Cir.), *cert. denied,* 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986); *Jarrell v. Balkcom,* 735 F.2d 1242 (11th Cir. 1984), *cert. denied,* 471 U.S. 1103, 105 S.Ct. 2331, 85 L.Ed.2d 848 (1985).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JACK STANLEY TOWNE,

Petitioner,

v. CASE NO. 88-502-CIV-ORL-18

LEONARD DUGGER, et al.,

Respondents.

ORDER

This cause involves a petition for writ of habeas corpus filed by Jack Stanley Towne, a prisoner of the state of Florida. Upon consideration of the petition the Court ordered the Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, the Respondents filed a Motion for Summary Judgment which this Court will treat as a reply to the petition for writ of habeas corpus in compliance with this Court's instructions and *The Rules Governing § 2254 Cases in the United States District Courts.* Petitioner filed a Final Brief and Objection to Respondents' Motion for Summary Judgment which this Court has also taken into consideration in reaching its decision.

Petitioner entered pleas of nolo contendere in four cases involving charges of armed burglary, aggravated assault, and sexual battery with a weapon. The pleas were entered with an express reservation of the right to appeal the trial court's denial of the motion to suppress. Petitioner and the State stipulated that the issues presented by the suppression motion were dispositive of the cases against him. Peti-

tioner was arrested for loitering and prowling. During his interrogation at the police station, he confessed to committing numerous other crimes. The relevant facts have been stated in the opinion written by the Florida First District Court of Appeal, *Towne v. State*, 495 So.2d 895 (Fla. 1st DCA 1986), and are restated by this Court below.

On December 4, 1984, at 1:00 a.m., Petitioner was arrested at an apartment complex which was located next to the complex where he lived. The arresting officer, Gary David Manning, had been dispatched to the Villas Apartments in response to a complaint that a prowler was peeking in windows. Officer Manning observed Petitioner walk to a window and crouch down to look in the window for several seconds. Petitioner matched the description the officer had been given of the prowler. Officer Manning's radio squawked revealing his presence, whereupon Petitioner hastily left his position at the window. Although Petitioner did not run as Officer Manning approached, his pace continuously quickened as the officer moved toward him. The officer caught up with Petitioner at a car. Petitioner denied ownership of the car and denied having keys in his hand. When asked to explain his reason for being in the apartment complex, Petitioner replied that he was looking for a classmate in order to find out when a particular exam was scheduled. Petitioner was unable to give the name or address of the classmate. When Petitioner pointed in a direction away from the particular building where his classmate purportedly lived, Officer Manning arrested him for loitering and prowling.

Petitioner's account of the circumstances differs somewhat from that of Officer Manning. Petitioner said that he left his apartment at 12:30 a.m. to pick up computer printouts at school and he intended to stop by a classmate's apartment to ask when exams were scheduled in the class. He had never been to the apartment before and did not know

the classmate's last name, so he had trouble locating her apartment. At some point during his walk through the apartment complex, Petitioner stooped or crouched down and looked in an open apartment window. After he looked in the window, he noticed a police officer with a walkie-talkie crouched down by a telephone pole. As Petitioner walked towards his car, the officer approached him. Petitioner explained to him that he did not know his friend's last name and was uncertain about the apartment. He explained that the car was a rental car and he did not have keys in his hand because he had put them into his pocket.

Officer Manning placed Petitioner under arrest within two minutes or less after he approached him at the car. The officer arrested Petitioner for loitering and prowling because the answers Petitioner gave to his questions were imprecise and too insufficient to be considered truthful. When asked whether he had made the arrest on the basis of an inarticulable hunch, Officer Manning explained that when he first observed Petitioner, he immediately thought Petitioner was the suspect in a rape investigation he had been conducting. The officer then agreed that it was an inarticulable hunch, since he could not explain why he felt as he did.

Petitioner was given the Miranda rights, both at the car and at the time of the arrest, and again at the police station. Petitioner maintains that he asked to see a lawyer, and Officer Manning told him he could have an attorney, but if he elected to go that route, the officer would "throw the book at him." Petitioner then alleges that Officer Manning told Petitioner that he thought Petitioner had psychological problems and he was interested in helping Petitioner with his problems and in helping Petitioner obtain release on his own recognizance and eventually obtain probation. In addition, Petitioner maintains that the detectives and Officer Manning told him that tape recording his statements would

not only assist in a court proceeding, but could be used by a psychiatrist to determine the nature of his stress. Petitioner contends that he trusted the officers and relied upon their representations.

Officer Manning and the detectives have a different version of the events that took place. They allege that Petitioner was given his Miranda warnings several times and Petitioner indicated that he understood his rights. The officers contend that Petitioner did not request an attorney, and though the officers acknowledge that Officer Manning promised to do everything he could to help, the discussions concerning offers of psychiatric treatment and other help occurred in the context of the "entire realm of possibilities" attendant upon disposition of the case. According to the officers, these discussions occurred *after* Petitioner had made incriminating statements. The officers testified that no promises were given and that Petitioner read and signed a form waiving his right to consult an attorney.

The psychiatrist appointed by the court to evaluate Petitioner's psychological status testified that at the time Petitioner talked with the investigators, he was primarily motivated by his desire to get help. He testified further that Petitioner was peculiarly susceptible to suggestions that psychological counseling could be made available to him. In the psychiatrist's opinion, Petitioner would not have confessed if he had not been promised psychological help.

The trial court ruled that the initial stop and arrest was valid and legal, and that Petitioner's statements were made freely, knowingly, and voluntarily. (Respondents' Exhibit F). On his direct appeal, Petitioner raised two issues: (1) whether the initial stop and arrest was illegal, and (2) whether Petitioner's statements were voluntarily given. The Florida First District Court of Appeal affirmed in *Towne v. State,* 495 So.2d 895 (Fla. 1st DCA 1986).

Petitioner filed the present petition for writ of habeas corpus on June 10, 1988. Petitioner raises three grounds for relief: (1) Conviction obtained by use of a coerced confession, (2) Conviction obtained by evidence acquired pursuant to an unlawful arrest (Fourth Amendment), and (3) Conviction obtained by violation of the privilege against self-incrimination.

I. Coerced Confession

Petitioner argues that his confession of committing various crimes was a direct result of promises made by Officer Manning. According to Petitioner, Officer Manning warned him that if he elected to seek counsel, Officer Manning would "throw the book at him." Petitioner further contends that Officer Manning told Petitioner that he was from a "new school" of police officers who believed in helping people seek treatment rather than causing them to go to prison. Petitioner also claims that Officer Manning promised to arrange for him to be released on recognizance and to help him obtain probation in lieu of prison. Petitioner argues that Officer Manning took advantage of his vulnerable desire to obtain psychiatric treatment. Petitioner states that he relied on Officer Manning's assurance that the tape recordings of the proposed confession would be used to determine the nature of his stress by a psychiatrist, thus leading him to believe something contrary to the Miranda understanding he had just been read.

Dr. Harry Krop, a psychiatrist, was requested and appointed as a defense expert to determine Petitioner's psychological status, to make recommendations, and to assist in the preparation of Petitioner's defense. (R. 341). Based on the test results and conversations with Petitioner, Dr. Krop testified that Petitioner would not have confessed if he had not been promised psychological help. (R. 356).

Officer Manning testified that he did tell Petitioner that he would try to help him obtain psychiatric help, but that this promise occurred *after* the investigation was completed and the confession taped. Officer Manning also stated that he did not promise Petitioner probation or release on recognizance. He conceded that he did tell Petitioner the realm of possible sentences, but did not promise any particular sentence. (R. 462, 472, 530). He testified that no promises or threats were made. (R. 474). He also testified that Petitioner affirmatively stated his willingness to testify without a lawyer. (R. 449, 456, 464). Officer Manning's testimony also differs from Petitioner regarding the taped confession. Officer Manning testified that he told Petitioner that the tape *would* be used against him and that it *could* be used by a psychologist to determine stress. (R. 553).

Detective Stephen W. Kramig testified that Petitioner signed a written Miranda waiver and did not request counsel. (R. 583-585). He also testified that information about psychological treatment was not discussed with Petitioner until *after* the confession was recorded on tape. (R. 648).

Petitioner's argument is that the State trial court erred in making the factual determination that the confession occurred before any promises of psychiatric help or possible leniency were made. Thus, Petitioner argues that this Court should make a de novo finding of fact that the Officers' testimony should be rejected and that the promise of psychiatric help was made prior to the confession and that such promise of help induced the confession.

A firmly established principle of federal habeas corpus law which is applicable to this case is the presumption of correctness which must be afforded to a State court's expression or implied finding of fact. In *Marshall v. Lonberger,* 459 U.S. 422 (1983), the Court held that in reviewing factual determinations by state courts, federal courts must accord those

determinations high deference. "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." *Id.* at 432. *See* 28 U.S.C. § 2254(d).

There is clearly support in the record for the State trial court's implied finding of fact that the confession occurred before any possible promises of help which might have induced such a confession. In fact, if this Court were required to render a de novo factual finding based on the transcript, this Court would have reached the same result that Petitioner's confession was freely and voluntarily given. Therefore, Ground One of the petition for writ of habeas corpus is rejected.

II. Confession is Result of Unlawful Arrest

Petitioner argues that Officer Manning lacked probable cause to arrest him for loitering and prowling and the subsequent confession for committing other crimes was the "fruit" of the illegal arrest. The Supreme Court, in *Stone v. Powell,* 428 U.S. 465 (1976), concluded that where an opportunity for full and fair litigation of a Fourth Amendment claim has been provided, "a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnote omitted). In order to be entitled to federal habeas review of a Fourth Amendment challenge, Petitioner must demonstrate that he was denied an opportunity for full and fair litigation of that claim before the state trial court and on direct review. *Id.* at 495 n. 37. *Stone* bars the relitigation of the Fourth Amendment claim before this Court even if the state trial judge made an erroneous decision on the merits of the claim.

Swicegood v. Alabama, 577 F.2d 1322, 1324-25 (5th Cir. 1978).

Petitioner has failed to show that the suppression hearing conducted in the state court denied him of an opportunity for a fair and full litigation of his Fourth Amendment claim. Petitioner now urges this Court to reconsider the merits of the suppression motion. But as indicated, even if the state Court made an erroneous decision, *Stone* bars the relitigation of Petitioner's Fourth Amendment issue before this Court.

In *Caldwell v. Taylor*, 461 U.S. 571 (1983), the Supreme Court, in a Per Curiam decision, extended the rationale of *Stone* to include custodial statements made after an illegal arrest. That is, statements made at the police station are treated the same way as other evidence obtained by a search. Thus, if the Fourth Amendment issue is barred from federal habeas corpus review, then statements made as a result of the arrest are also covered under the rule of *Stone v. Powell*. "Only if the statements were involuntary, and therefore obtained in violation of the Fifth Amendment, could the federal courts grant relief on collateral review." *Id.* at 573. This court has already determined above that the statements made by Petitioner were voluntary. Therefore, the issue of whether the arrest of Petitioner violated the Fourth Amendment and whether the statements made by Petitioner should have been excluded are barred from review in this Court under *Stone v. Powell* and *Caldwell v. Taylor*. Petitioner's request for habeas corpus relief under Ground Two is denied.

III. Self-Incrimination: Denial of Right to Counsel

Petitioner argues that repeated requests for counsel were not honored by the police and therefore his confession is not admissible. Petitioner alleges that when he asked for a

lawyer, Officer Manning responded that if Petitioner went that route, Officer Manning would see that he received the maximum penalty. Petitioner also notes that Officer Manning conceded that Petitioner asked him if he though Petitioner should obtain a lawyer. (R. 516).

Officer Manning testified that Petitioner never asked to speak with an attorney prior to questioning. He testified that he read Petitioner the Miranda rights and Petitioner said that he did not want an attorney. (R. 447-456). Officer Manning also testified that he did not threaten or attempt to dissuade Petitioner from obtaining counsel. (R. 456, 516-520).

In *Edwards v. Arizona,* 451 U.S. 477 (1981), the Supreme Court held that once an individual has expressed a desire to consult with an attorney and to deal with the authorities only through an attorney, this request must be honored and the accused may not be subject to further interrogation until he has been provided with counsel or initiates further conversation with the police. The threshold inquiry with regard to waiver of the right to counsel is whether the right to counsel has in fact been invoked. *Smith v. Illinois,* 469 U.S. 91 (1984).

> This case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance. On occasion, an accused's asserted request for counsel may be ambiguous or equivocal. Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease ... Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together ... We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or

> equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation.

Id. at 95-100

The State Appellate Court below held:

> We conclude that under the circumstances, the trial court could have concluded that appellant did not request assistance of counsel during interrogation. The transcript of the suppression hearing indicates appellant testified that after he had been transported to the police station, he asked to see a lawyer. Controverting testimony was provided by the officers, who stated unequivocally that although appellant asked the officers if he *thought* he should have a lawyer — he did not request counsel. Consistent with the officers' assertion is record evidence that appellant telephoned his wife and advised her that he did not get a lawyer because he believed that the police were going to help him. Corroborative evidence that appellant did not invoke the right to counsel is the fact that he signed a written waiver of the right to counsel.

Towne v. State, 495 So.2d 895, 899 (Fla. 1st DCA 1986).

As noted above, the standard of review is that a presumption of correctness must be afforded to a State court's expression or implied finding of fact. There is clearly support in the record for the State trial court's implied finding of fact that Petitioner did not request counsel, but rather only asked the officers if they thought he should obtain counsel. Thus the question before this Court is limited to whether asking a police officer's advise on whether counsel should be obtained is an invocation of the right to counsel under

Edwards, supra. The Eleventh Circuit Court of Appeals has held that in the absence of an invocation of the right to remain silent, it can be presumed that the right has been knowingly and intelligently relinquished. "Once warnings have been given, it is for the individual to indicate in any manner and at any time, prior to or during the questioning, that he wishes to remain silent (citations omitted)." *Cape v. Francis,* 741 F2d 1287, 1298 (11th Cir. 1984), *cert denied* 474 U.S. 911 (1985).

The first issue that must be resolved is whether asking a police officer's advice on whether counsel should be obtained is an equivocal statement. When there is an equivocal request for counsel, all further questioning must be limited to clarifying Petitioner's equivocal request. Questioning on other areas may be undertaken only after it is determined that the accused is not invoking his right to counsel. *Thompson v. Wainwright,* 601 F.2d 768 (5th Cir. 1979). This Court's resolution of whether the statement was equivocal is of utmost importance because Officer Manning conceded that during the course of their conversation after Petitioner asked him for his advice regarding counsel, Officer Manning said, "I believe you are the person I've been looking for the past year." (R. 517). He also told Petitioner that Petitioner had matching shoe prints of a suspect and that Officer Reddick was pretty sure that Petitioner was the same person Officer Reddick had chased in a prior crime. (R. 518). Officer Manning also told Petitioner that there was a witness who could identify the scar on Petitioner's hand. (R. 519). Obviously these statements by Officer Manning were not permissible if Petitioner's question about counsel is an equivocal request for counsel. Thus if Petitioner's question was an equivocal request for counsel, Officer Manning's statements could have caused Petitioner to confess and such a confession would have to be suppressed.

There is very little guidance by other federal courts on when statements should be considered equivocal. "We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal ..." *Smith v. Illinois,* 469 U.S. 91, 99-100 (1984). "[T]he court will not construe any mention of an attorney as an invocation of the right to counsel or as an equivocal request for counsel which forecloses interrogation." *Gorel v. United States,* 531 F.Supp 368 (S.D.TX 1981).

The Florida Supreme Court held in a factually similar case that asking a police officer whether counsel should be obtained does not make further conversation impermissible.

> ... Norris then asked the detective interrogating him whether or not he needed an attorney. The detective responded that he could not make that decision for Norris and that if Norris wanted an attorney he would quit talking to him at that time. Norris thereafter said that he would answer questions but only the ones he wanted to answer. He now contends that the state did not demonstrate a valid waiver because the police never answered his question of whether he need an attorney.
>
> We find that the response given by the detective did not make further conversation with Norris either impermissible or inadmissible. *See North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct 1755, 60 L.Ed.2d 286 (1979). The failure to answer Norris' question neither lulled him into waiving an attorney nor prevented his asking for one...Investigating officers must respond affirmatively to a request for counsel, but they are not required to try to convince a defendant that he needs an attorney. (citations omitted).

Norris v. State, 429 So.2d 688, 689 (Fla. 1983).

The major difference between the present case and *Norris* is that in *Norris* the police officer told the defendant that he could not answer his question and offered to terminate all questioning. In the present case, Officer Manning conceded that he made certain accusatory statements. Nevertheless, this Court finds that merely asking for advice on whether counsel should be obtained does not rise to the level of being an equivocal invocation of the right to counsel. This Court is not willing to order the suppression of Petitioner's confession because of a mere question he asked the police officer without a more definite indication of his desire to have counsel. *Miranda v. Arizona,* 384 U.S. 436 (1966), was never intended to be an inflexible per se rule. *Miranda* was intended to require that the accused be fully informed of his rights and that he be given a full opportunity to exercise those rights. *See North Carolina v. Butler,* 441 U.S. 369 (1979). It is clear from the record that Petitioner was advised of his *Miranda* rights on numerous occasions and had ample opportunity to expressly request counsel. The *Miranda* decision was never intended to be used in a situation like the present case as a vehicle for guilty people to escape punishment. The *Miranda* Court could not have intended to create a rule that lower courts must broadly construe questions suspects ask police officers to include an intention to invoke the right to counsel. Finally, this Court notes that a common sense interpretation of Petitioner's question of whether he should obtain counsel mandates a finding that he was not actually requesting counsel. In any event, due to the importance of this issue, this Court hereby certifies that Petitioner has probable cause to appeal whether asking for advice on the need for counsel constitutes an equivocal request for counsel.

Any of the Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The Petition for Writ of Habeas Corpus filed by Jack Stanley Towne is hereby DENIED;

2. The Court hereby issues a certificate of probable cause for appeal in this case because the Petitioner has made a colorable showing of the deprivation of a federal constitutional right as to Ground Three of his Petition.

3. The Court also grants the Petitioner in forma pauperis status for purposes of appeal because such appeal by the Petitioner would be taken in good faith.

DONE AND ORDERED in Chambers at Orlando, Florida, this 18 day of October, 1988.

G. KENDALL SHARP
UNITED STATES DISTRICT JUDGE

Copies to:
Pro Se Law Clerk
Jack Stanley Towne
Kurt L. Barch, Esquire

IN THE

District Court of Appeal

First District, State of Florida

JACK STANLEY TOWNE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

Not final until time expires to file rehearing motion and disposition thereof if filed.

CASE NO.: BI-354

Opinion filed October 13, 1986.

An Appeal from the Circuit Court for Alachua County, Elzie Sanders, Judge.

Terry P. Lewis, Special Assistant Public Defender, Tallahassee, for Appellant.

Jim Smith, Attorney General and Kurt L. Barch, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, J.

Appellant, Jack Stanley Towne appeals from the denial of his motion to suppress statements and physical evidence. The questions presented for our review are: (1) whether the arrest was lawful, and (2) whether appellant's statements were voluntarily given. We affirm.

Appellant entered pleas of nolo contendere in four cases involving charges of armed burglary, aggravated assault,

and sexual battery with a weapon. The pleas were entered with an express reservation of the right to appeal the trial court's denial of the motion to suppress. Appellant and the state stipulated that the issues presented by the suppression motion were dispositive of the cases against him.

On December 4, 1984, at 1:00 a.m., appellant was arrested at an apartment complex which was located next to the apartment complex where he lived. The arresting officer had been dispatched to the Villas Apartments in response to a complaint that a prowler was peeking in windows. The officer observed appellant walk approximately thirty paces, stop next to a window, and then crouch down to look in the window for several seconds. Appellant matched the description the officer had been given of the prowler. The officer's police radio squawked revealing his presence, whereupon appellant hastily left his position at the window. Although appellant did not run as the officer approached, his pace continuously quickened as the officer moved toward him. The officer caught up with appellant at a car. Appellant denied ownership of the car and denied having keys in his hand. When asked to explain his reason for being in the apartment complex, appellant told the officer he had gone to ask a classmate about the time schedule for an exam. He was unable, however, to give the name or address of the classmate. When appellant pointed in a direction away from the particular building where his classmate purportedly lived, the officer arrested him for loitering and prowling.

Appellant's account of the circumstances of his arrest differs somewhat from that of the officer. Appellant said he left his apartment at 12:30 a.m. to pick up computer printouts at school and he intended to stop by a classmate's apartment to ask when exams were scheduled in the class. He had never been to the apartment before and did not know the classmate's last name, so he had trouble locating her apartment. At some point during his walk through the

apartment complex, appellant stooped or crouched down and looked in an open apartment window. Appellant said that after he looked in the window, he noticed a police officer with a walkie-talkie crouched down by a telephone pole. As appellant walked towards his car, the officer approached him. Appellant explained that he did not know his friend's last name and was uncertain about the apartment. He explained that the car he was about to get in was a rental car, and he told the officer he did not have keys in his hand because he had put them in his pocket.

The officer placed appellant under arrest within two minutes or less after he approached him at the car. The officer arrested appellant for loitering and prowling, because the answers appellant gave to his questions were too imprecise and so insufficient to be considered truthful. When asked whether he had made the arrest on the basis of an inarticulable hunch, the officer explained that when he first observed appellant, he immediately thought appellant was the suspect in a rape investigation he had been conducting. The officer then agreed that it was an inarticulable hunch, since he could not explain why he felt as he did.

Appellant was given the Miranda rights, both at the car at the time of the arrest, and again at the police station. Appellant maintains that he asked to see a lawyer, and the arresting officer told him he could have an attorney but if he elected to go that route the officer would "throw the book at him." According to appellant, the officer then told him he recognized that appellant had psychological problems. Appellant said the officer told him he was a "new school" officer, that he was interested in helping appellant with his problems, that he would help appellant obtain release on his own recognizance, and that he would help appellant obtain probation. In addition, appellant maintains the detectives and the arresting officer told him that tape recording his statements would not only assist in a court proceeding, but could

be used by a psychiatrist to determine the nature of his stress. Appellant contends he trusted the officers and relied upon their representations.

Again, the officers' version of the events surrounding the circumstances of appellant's incriminating statements differs from that of appellant. The officers note appellant was given his Miranda warnings not once, but several times, and he indicated he understood the rights available to him. The officers contend appellant did not request an attorney, and though the officers acknowledge the arresting officer promised to do everything he could to help, the discussions concerning offers of psychiatric help and promises to do everything possible to help him occurred in the context of the "entire realm of possibilities" attendant upon disposition of the case. According to the officers, these discussions occurred after appellant had made incriminating statements. The officers testified that no promises were given, and note that appellant read and signed a form waiving his right to consult an attorney.

The psychiatrist appointed by the court to evaluate appellant's psychological status testified that at the time appellant talked with the investigators, he was primarily motivated by his desire to get help. The psychiatrist testified further that appellant was peculiarly susceptible to suggestions that psychological counseling could be made available to him. In the psychiatrist's opinion, appellant would not have confessed if he had not been promised psychological help.

The trial court ruled the initial stop and arrest was valid and legal, and that appellant's statements were made freely, knowingly and voluntarily.

Appellant's arrest was predicated upon Section 856.021, Florida Statutes (1983), which provides:

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
>
> (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.
>
> (3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Since loitering and prowling is a misdemeanor, only the officer's own observations will be considered in determining probable cause to arrest. s. 901.15(1), Fla.Stat.(1983); *State v. Ecker,* 311 So.2d 104 (Fla.), *cert. denied,* 423 U.S. 1019, 96

S.Ct. 455, 46 L.Ed.2d 391 (1975); *T.L.M. v. State,* 371 So.2d 688 (Fla. 1st DCA 1979); *Springfield v. State,* 481 So.2d 975 (Fla. 4th DCA 1986). Upon observing conduct which the officer considers suspect, he must then "be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonable warrant' a finding that a breach of the peace is imminent or the public safety is threatened." *State v. Ecker,* 311 So.2d at 109, quoting *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906 (1968). To justify an arrest pursuant to Section 856.021, proof as to both elements of the statute must be established. *B.A.A. v. State,* 356 So.2d 304, 306 (Fla. 1978); *State v. Ecker,* 311 So.2d at 110; *Patmore v. State,* 383 So.2d 309, 310 (Fla. 2d DCA 1980).

In the instant case, a consideration of appellant's conduct in light of the factors which have been upheld as supporting an arrest for loitering and prowling demonstrates first, that appellant's suspect conduct was observed by the arresting officer; second, appellant matched the description of a reported trespasser; and third, appellant's explanation for his presence at the apartment complex lacked sufficient specificity to assure the arresting officer of its truth. We find that in the circumstances of this case, there was probable cause to arrest.

To be admissible, a confession or incriminating statement must be made voluntarily. *Brewer v. State,* 386 So.2d 232,2 235 (Fla. 1980). The voluntariness of a confession is measured by the fifth amendment privilege against self-incrimination in state prosecutions as in federal. *Malloy v. Hogan* 378 U.S. 1, 844 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The appropriate inquiry for a determination of voluntariness was set forth in *Bram v. U.S.,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), and provides that:

> a confession, in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises however slight nor by the exertion of any improper influence ... A confession can never be received by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

See also *Brewer v. State,* 386 So. 2d at 235; *Hawthorne v. State,* 377 So.2d 780, 784 (Fla. 1st DCA 1979); *State v. Kettering,* 483 So.2d 97, 98 (Fla. 5th DCA 1986). It is the state's burden to prove, by a preponderance of the evidence, that the statement was made voluntarily. *Brewer v. State,* 386 So.2d at 236; *Wiley v. State,* 427 So.2d 283 (Fla. 1st DCA 1983); *Gaspard v. State,* 387 So.2d 1016 (Fla. 1st DCA 1980); *State v. Kettering,* 483 So. 2d at 98.

One aspect of the voluntariness, hence admissibility, of a confession or incriminating statement, is the waiver of the right to assistance of counsel during custodial questioning. The threshold inquiry with regard to waiver is whether the right to counsel was ever invoked. *Smith v. Illinois,* 469 U.S.,105 S.Ct., 83 L. Ed.2d 488 (1984). If an accused has in fact invoked the right to have counsel present during custodial questioning, then —

> a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interro-

> gation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 378, 386 (1981).

In *Cannady v. State,* 427 So.2d 723, 729 (Fla. 1983), the court held the stricter standard of *Edwards v. Arizona* can be overcome by showing that an accused has knowingly and intelligently waived a previous request for counsel when he voluntarily executes a written waiver. Similarly, in *Waterhouse v. State,* 429 So.2d 301, 305 (Fla.), *cert. denied* 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983), the court found *Edwards* was not applicable "because appellant did not express a desired to deal with the police only through counsel." And in *Norris v. State,* 429 So.2d 688, 689 (Fla. 1983), the court held that although "[i]nvestigating officers must respond affirmatively to a request for counsel, ... they are not required to try to convince a defendant that he needs an attorney."

We conclude that under the circumstances, the trial court could have concluded that appellant did not request assistance of counsel during interrogation. The transcript of the suppression hearing indicates appellant testified that after he had been transported to the police station, he asked to see a lawyer. Controverting testimony was provided by the officers, who stated unequivocally that although appellant asked the officers if they *thought* he should have a lawyer -- he did not request counsel. Consistent with the officers' assertion is record evidence that appellant telephoned his wife and advised her that he did not get a lawyer because he believed the police were going to help him. Corroborative evidence that appellant did not invoke the right to counsel

is the fact that he signed a written waiver of the right to counsel.

The voluntariness issue is more difficult to resolve. It is undisputed that the officers discussed the possibility of treatment at North Florida Evaluation and Treatment Center, and that the arresting officer promised appellant he would do everything he could to make sure appellant received psychiatric help. Nevertheless, the trial court was persuaded that all discussions concerning offers of help were held in the context of the ultimate disposition of the case and *after* appellant had confessed.

It is well settled that the ruling of the trial court on a motion to suppress comes to the reviewing court clothed with a presumption of correctness and that "the reviewing court will interpret the evidence and reasonable inference derived therefrom in a manner most favorable to sustain the trial court's ruling." *McNamara v. State,* 375 So.2d 410, 412 (Fla. 1978). We cannot say as a matter of law, that the trial court erred in finding the appellant's statements were made voluntarily.

Therefore, the trial court's ruling on the motion to suppress is affirmed.

ZEHMER, J. and CAWTHON, VICTOR M., ASSOCIATE JUDGE, CONCUR.

IN THE

United States Court of Appeals for the Eleventh Circuit

NO. 88-3938

JACK STANLEY TOWNE,

Petitioner-Appellant,

versus

LEONARD DUGGER,
BOB BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING

(June 7, 1990)

BEFORE: KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellees, Leonard Dugger and Bob Butterworth, are denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

ORD-41

ORIGINAL

90-345

IN THE

COURT OF THE UNITED STATES

OCTOBER TERM 1990

HOWARD DUGGER, et al.

Petitioners,

Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

LEONARD DUGGER, et al.,

Petitioner,

v.

JACK STANLEY TOWNE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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& MARKMAN, P.A.
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QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under the habeas corpus statute, 28 U.S.C. § 2254(a), to consider a claim by a state prisoner who, while in custody and after equivocally requesting an attorney, is interrogated by the police without counsel and intimidated into making a confession in violation of Miranda and Edwards v. Arizona.

2. Whether the argument that Stone v. Powell should be extended to bar federal habeas corpus review of claims of Miranda violations should be considered on certiorari where the point is raised for the first time in the Court of Appeals and the federal district court judge never had the opportunity to consider it.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

LEONARD DUGGER, et al.,

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JACK STANLEY TOWNE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Dugger's "Statement of the Case" contains critical inaccuracies, omissions, and misstatements going both to this Court's jurisdiction and to the issues that would properly be before this Court if certiorari were granted. For these reasons, the determinative facts and issues, which are stated and readily available in the Court of Appeals' comprehensive eight page published decision, Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990), are incorporated by reference. Key omissions and misstatements going to this Court's exercise

of its discretion under Rule 10 are corrected here. Rules 15.1, 24.2.

A. Statement of the Facts

Dugger's Petition correctly states that after his arrest and before making any statements, Towne asked Officer Manning if he thought Towne needed an attorney. Pet. at 3. In reciting Manning's testimony at the suppression hearing, however, Dugger's Petition excludes half of the colloquy relied on by the Eleventh Circuit. The full excerpt quoted by the Court of Appeals is as follows:

> Q. [By defense attorney] The subject [of seeing a lawyer] was brought up, wasn't it, before [Towne] made [the taped confession] to you?
>
> A. Yes, sir
>
> Q. Who brought it up?
>
> A. He did.
>
> Q. Okay. How did he bring it up?
>
> A. He asked me if I thought he needed a lawyer.
>
> Q. But he didn't say anything before that like, I think I am in a lot of trouble, I think I need a lawyer, I might need a lawyer, what do you think officer?
>
> A. He basically asked me what -
>
> Q. He just said "officer, what do you think about whether I should get a lawyer?"
>
> A. Something to that effect, yes, sir.

Towne, 899 F.2d at 1107.

Leaping immediately from Manning's testimony to a listing of the types of incriminating evidence Manning told Towne he

possessed, Pet. at 3-4, Dugger's petition completely omits from its Statement of the Case the fact that Manning not only failed to clarify Towne's request for counsel, but he also used the evidence he supposedly possessed to "intimidate[] Towne by making accusatory statements." 899 F.2d 1110-11 (emphasis added). In this regard, the record shows and the Eleventh Circuit found

> No attempt was made by Officer Manning or any other police officer to clarify or discuss in any way Towne's inquiry regarding getting a lawyer. Instead, Officer Manning concedes that he responded to Towne by making accusatory statements regarding the assault, burglary, and sexual battery offenses to which Towne later confessed.

Id. at 1107 (emphasis added).

Dugger's Statement of the Case fails to mention that the accusatory and intimidating statements with which Manning threatened Towne were apparently without factual basis. Manning told Towne that Officer Reddick was pretty sure that Towne was the same person Reddick had chased in a prior crime and that there was a witness who could identify the scar on Towne's hand. Id. Reddick later conceded, however, that he could not positively identify Towne as the person he had chased, R 565-66, and Manning admitted he could not remember the identity of the witness who supposedly could identify the scar on Towne's hand. R 519-21.[1/]

1/ That these accusations were baseless and the prosecution had no evidence against Towne other than his coerced confession is evidenced by the parties' stipulation that the state trial court's ruling on the motion to suppress Towne's confession was dispositive of the charges against him. Towne, 899 F.2d at 1111.

B. Opinions Below

1. The State Trial Court's Order

In addition to overlooking important facts, Dugger's Statement of the Case is also flawed by its inaccurate depiction of the holdings of the state and federal courts below. While Dugger is correct that the state trial court entered an order denying Towne's motion to suppress, Pet. at 4, Dugger does not mention that, as the Eleventh Circuit noted, "the order announced no specific findings of fact." 899 F.2d at 1104. The trial court made a one sentence summary finding that Towne's confession was "freely, knowingly and voluntarily given." Id. It did not mention Towne's question to Manning regarding getting a lawyer, and did not make even one specific finding of fact going to the issue on which this case was decided in the Eleventh Circuit - whether Towne's question was an equivocal request for counsel such that Manning's resumption of uncounselled interrogation without clarifying Towne's request rendered his subsequent confession inadmissible under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

2. The State Appellate Court's Decision

Towne did not stand trial and was not convicted by a jury after the trial judge denied the motion to suppress. Instead, under the Florida procedure and with the State's agreement, Towne entered pleas of nolo contendere while reserving his

right to appeal the denial of his suppression motion. 899 F. 2d at 1104.

The Florida appellate court affirmed the trial judge. Towne v. State, 495 So. 2d 895 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So. 2d 768 (Fla. 1987). Like the trial judge, the state court of appeals did not specifically address the determinative questions of whether Towne made an equivocal request for counsel and, if so, whether Manning's resumption of interrogation through accusatory statements instead of clarification of the request violated Towne's Fifth Amendment rights under Miranda and Edwards. Instead, the Florida appellate court held only that Towne had not requested a lawyer. Towne v. Dugger, 899 F.2d at 1105; Towne v. State, 495 So. 2d at 899.

Towne also argued in the Florida District Court of Appeal that his confession was involuntary on the ground that the arresting officer promised Towne psychiatric and other help in return for it. On this specific fact question, which is involved neither in the Eleventh Circuit's reversal nor in the instant certiorari proceeding, the Florida appeals court found there was sufficient evidence to support the trial judge's implicit finding that these promises did not improperly induce Towne to confess because they were made after Towne's confession. Towne v. Dugger, 899 F.2d at 1105; Towne v. State, 495 So. 2d at 899.

3. The Federal District Court's Order

Contrary to the impression left by Dugger, Pet. at 5, the federal district court did not state in the context of the equivocal request for counsel issue on which this case turns that Towne's confession was "freely and voluntarily given." To the contrary, the only finding by the district court that Towne acted "freely and voluntarily" was in its discussion of the distinct question of whether the police officer's promises of psychological or other help were made before or after Towne confessed. App. Pet. at A-24. On this particular question, analyzed in part I of the district court's order, the district court agreed with the Florida appellate court. App. Pet. at A-24.

Part III of the order, titled "Self-Incrimination: Denial of Right to Counsel," addressed the equivocal request issue on which the Eleventh Circuit reversed the district court. App. Pet. at A-25. It is true that the district judge held Towne's question to Manning about getting an attorney was not an equivocal request for counsel. Pet. at 5. Contrary to the impression left by Dugger, Pet. at 5, however, the district court did not find Towne acted "freely and voluntarily" in the context of this determinative question. Instead, the district court correctly recognized that had an equivocal request been made, subsequent questioning of Towne would have been impermissible under the holding in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). App. Pet. at

26.[2/] Acknowledging that the threshold question of whether Towne made an equivocal request for counsel was "of the utmost importance," the district judge held Manning's resumption of questioning through accusatory statements was

> not permissible if Petitioner's question about counsel is an equivocal request for counsel. Thus if Petitioner's question was an equivocal request for counsel, Officer Manning's statements could have caused Petitioner to confess and such a confession would have to be suppressed.

App. Pet. at A-28 (emphasis added).

"[D]ue to the importance of this issue," the district court certified that Towne had probable cause to appeal "whether asking for advice on the need for counsel constitutes an equivocal request for counsel." Towne was granted in forma pauperis status based on the district court's finding that his appeal would be taken in good faith. App. Pet. at A-30, 31.

4. The Eleventh Circuit's Decision

Dugger's assertion that the Eleventh Circuit held Towne's confession was "not coerced and was freely and voluntarily given," Pet. at 5, is a complete misstatement of the Court's holding. In affirming part I of the district court's order, which involved the question of whether Towne was promised psychiatric help before or after he confessed, the Court of Appeals did agree with the district court's conclusion that

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2/ The court's order articulated the well settled rule under Edwards that "once an individual has expressed a desire to consult with an attorney, this request must be honored and the accused may not be subject to further interrogation until he has been provided with counsel or initiates further conversation with the police." App. Pet. at A-26.

Towne was "not coerced" by the police's "promises of psychiatric or other help." Towne v. Dugger, 899 F.2d at 1106. On the other hand, with respect to the part III of the district court's order - the part that is actually in issue here - the Eleventh Circuit reversed the district court's finding that Towne had not equivocally requested counsel without making any statements that under any reading, however strained, could be construed to imply that Towne was not unconstitutionally coerced.

In this regard, the Court of Appeals held that Towne's question was an equivocal request for an attorney which, in violation of Towne's Fifth Amendment rights and Edwards, the police failed to clarify before continuing questioning and eliciting a confession. 899 F.2d at 1106, 1111. In stark and irreconcilable conflict with Dugger's assertion that the circumstances surrounding Towne's confession were non-coercive, free, and voluntary, Pet. at 5, the Eleventh Circuit specifically found that after Towne invoked his right to counsel and before he confessed he was threatened by Manning's "accusatory statements" which "intimidated Towne." Id. at 1107, 1110-11.

Dugger's fallback argument in the Eleventh Circuit, which now forms the basis of the certiorari petition, was that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), should be extended to preclude federal habeas corpus review of claimed Miranda violations. The Court of Appeals

rejected this contention in a single footnote. The Court held Dugger's failure to present this argument in the district court precluded its consideration on appeal and, in any event, the Court had twice previously rejected the same assertion. 899 F.2d at 1111 n.3. In his petition for rehearing, Dugger advanced the same theory in the Court of Appeals that he advances here as to why his Stone v. Powell argument was timely raised. Pet. at 11 n.3. The petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

With virtually no mention of Rule 10's considerations governing certiorari review, Dugger has repackaged his Stone v. Powell argument to claim for the first time in the more than two year history of this habeas case that the federal courts have all along been without jurisdiction. Under Dugger's theory, the extraction of Towne's uncounselled confession after his invocation of his right to an attorney presents only a "non-constitutional" violation of mere "prophylactic" rules that is not cognizable under the habeas corpus statute.

Dugger's recasting of his backup Eleventh Circuit argument as posing a jurisdictional question cannot withstand scrutiny. Review of the facts and the actual holdings of the lower courts reveals that this case involves a per se violation of rights under the Fifth Amendment that are in no way called into question by Justice O'Connor's concurrence in Duckworth v. Eagan, 492 U.S. ___, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989),

or by Stone v. Powell, or by the reasoning of any of the other authorities cited by Dugger. Further, even if the Supreme Court accepted Dugger's invitation to do what it has previously declined to do and extend Stone v. Powell to claimed Miranda violations, under the specific facts of this case, Towne's confession would still be suppressed because the instant Fifth Amendment violation is fundamental, not technical, and because the state courts did not provide Towne a full and fair opportunity to litigate it.

This Court need not reach any of these questions, however. Dugger's failure to timely present its Stone v. Powell argument in the district court precluded its consideration by the Court of Appeals. The Supreme Court should not grant certiorari to consider it now.

I. THE ELEVENTH CIRCUIT'S DECISION THAT TOWNE'S CONFESSION WAS INADMISSIBLE UNDER THE FIFTH AMENDMENT WHEN IT WAS EXTRACTED AFTER THE POLICE IGNORED AND FAILED TO CLARIFY HIS EQUIVOCAL REQUEST FOR COUNSEL DURING CUSTODIAL INTERROGATION DOES NOT CONFLICT WITH ANY OTHER FEDERAL APPELLATE DECISIONS OR PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE SUPREME COURT.

Even before the merits of this specific case are taken into account, Dugger's request for review on certiorari is faced with two formidable obstacles. First, the Supreme Court has previously denied the State of Florida's certiorari petition in a case granting relief to a defendant based on the same equivocal request for counsel issue that caused the Eleventh Circuit to reverse here. Long v. State, 517 So. 2d 660 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754,

100 L. Ed. 2d 216 (1988). It is not surprising, then, that Dugger does not urge this Court to grant certiorari to consider the equivocal request rule.[3/] Second, in two cases arising out of the Eleventh Circuit, the Supreme Court has in recent years denied certiorari where the Court of Appeals rejected the same argument Dugger makes here, that the ruling of Stone v. Powell should be extended to preclude federal habeas corpus review of Miranda violations. DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir.), cert. denied, 479 U.S. 953, 107 S. Ct. 444, 93 L. Ed. 2d 392 (1986); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985) (extension of Stone beyond its Fourth Amendment roots would be a major departure from established case law).

Dugger's present attempt to resurrect indirectly these issues under a "jurisdictional" label does not conceal the fact that the Supreme Court has previously declined to grant certiorari to review them in the past. When this background is considered in tandem with the specific facts and lower court holdings in this case, it becomes even more clear that there is

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3/ Relatedly, the Supreme Court also very recently denied the State of Florida's petition for certiorari in a case in which the defendant's conviction was reversed where his equivocal invocation of his right to terminate questioning was not clarified before interrogation continued. Florida v. Owen, 560 So. 2d 207 (Fla.), cert. denied, 1990 W.L. 116241 (1990).

no reason for this Court to grant certiorari to consider them now.

A. The Eleventh Circuit did not hold Towne's confession was not coerced and was freely and voluntarily given.

As the Statement of the Case shows, Dugger's contention that this case presents only a technical, non-constitutional violation of Miranda and Edwards rests entirely on his unfounded claim that the record shows and the Eleventh Circuit held Towne's confession was freely and voluntarily given. Pet. at 5-12. Dugger constructed his voluntariness premise by wrenching from context a passing statement from the one paragraph of the Eleventh Circuit's decision that is unrelated to the questions presented here, the paragraph upholding the district court's finding that the police officers' promises of psychiatric help followed rather than preceded Towne's confession. Towne v. Dugger, 899 F.2d at 1106. As all of Dugger's legal arguments concerning so-called mere "non-constitutional" violations of Miranda's "prophylactic" rules are completely dependent on this out of context and erroneous characterization of the Court of Appeals' actual holding, they all collapse immediately when the misstatement is exposed.

Simply put, there is no support for Dugger's bald assertion that the Eleventh Circuit held "Towne's confession was not coerced, and was freely and voluntarily given." Pet. at 5. In the context of the Fifth Amendment violation that compelled reversal in this case, the Court of Appeals

specifically found that instead of clarifying Towne's request for counsel, Office Manning concededly "intimidated Towne by making accusatory statements." Towne v. Dugger, 899 F.2d at 1107, 1110-11 (emphasis added). Even the district court judge, who erroneously denied habeas relief on the ground that Towne had not invoked his right to counsel, found that "if [Towne]'s question was an equivocal request for counsel, Officer Manning's statements could have caused [Towne] to confess and such a confession would have to be suppressed." App. Pet. at A-28 (emphasis added).

Dugger cannot succeed in making it appear that a statement by the Court of Appeals on a separate set of facts going to an immaterial issue[4/] has relevance to the distinct Fifth Amendment issue that prompted the Eleventh Circuit to reverse. The determinative facts are undisputed. Towne's confession was extracted after the police intimidated him with unfounded accusations rather than clarify his equivocal request, in violation of the Fifth Amendment and the cases construing it. Those cases are not challenged here.

All of Dugger's legal arguments on jurisdiction and Stone v. Powell are fatally flawed because they hinge on the

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4/ Indeed, even as to this immaterial side issue, Dugger badly overstates the case. The Court of Appeals held only that Towne's confession was "not coerced by promises of psychiatric or other help," 899 F.2d at 1106 (emphasis added), not that his "confession was not coerced and was freely and voluntarily given." Pet. at 5 (emphasis added).

unsupportable premise that Towne's confession was free and voluntary. For this reason alone, certiorari should be denied.

B. The fundamental, non-technical violation of Towne's Fifth Amendment rights would require suppression of his confession even under Justice O'Connor's concurrence in Duckworth v. Eagan.

Even if the concurrence in Duckworth v. Eagan, 492 U.S. _ _, 109 S. Ct. 2895, 106 L. Ed. 2d 166 (1989), on which Dugger relies could be deemed a "decision" of the Supreme Court within the meaning of Rule 10, certiorari still should not be granted because the Eleventh Circuit's opinion does not conflict with it. Duckworth involved a claimed Miranda violation based on the alleged inadequacy of the phrasing of a printed warning on a police form. As Justice O'Connor's concurrence stated, the habeas corpus claim in Duckworth involved whether "Miranda warnings were not given or were somehow deficient." 109 S. Ct. at 2883 (O'Connor, J., concurring) (emphasis added). This Court held the warnings in Duckworth sufficiently conveyed to the suspect his rights as required by Miranda. Id. at 2880-81.

In sharp contrast, the instant case does not involve the contention that the Miranda warnings given to the accused did not adequately advise him of his rights because of some deficiency in wording. Towne has not contended and does not now contend that, as in Duckworth, there was a technical defect in the manner in which the Miranda warnings were issued. Instead, Towne contends and the Court of Appeals reversed for a different and fundamental reason that goes to the very heart of

the core Fifth Amendment values protected by Miranda, Edwards, and their progeny. The Eleventh Circuit reversed because the police did not respect Towne's invocation of his right to counsel and, by continuing to interrogate, accuse, and intimidate him until he gave an uncounselled confession, they violated Towne's Fifth Amendment guarantee against self-incrimination. Towne, 899 F.2d at 1106-11

The violation of a suspect's right to have an attorney present during custodial interrogation directly implicates the Fifth Amendment itself. Fare v. Michael C., 442 U.S. 707, 719, 99 S. Ct. 2560, 2569, 61 L. Ed. 2d 197 (1979) ("an accused's request for an attorney is per se an invocation of his Fifth Amendment rights requiring that all interrogation cease"); Edwards v. Arizona, 451 U.S. at 485-86, 101 S. Ct. at 1885 (Fifth Amendment right to have counsel present at any custodial interrogation). Such a violation does not, as Dugger claims, involve only Miranda's "prophylactic" aspect or mere "non-constitutional" concerns. There is nothing in any of Dugger's cases to suggest that a Fifth Amendment violation of this fundamental character is not properly reviewed under the federal habeas corpus statute.

Indeed, so critical is this aspect of the Fifth Amendment's protection that an accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel. Smith v. Illinois, 469 U.S. 91, 98, 105 S. Ct. 490, 495, 83 L. Ed. 2d 488

(1984).[5/] Significantly, even the concurring opinion on which Dugger relies acknowledges that where, as here, one is compelled to confess by governmental coercion, "the suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself." Duckworth, 109 S. Ct. at 2883 (O'Connor, J., concurring) (citing Colorado v. Connelly, 479 U.S. 157, 163-64 & n.1, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) and Malloy v. Hogan, 378 U.S. 1, 6-8, 84 S. Ct. 1489, 1492-94, 12 L. Ed. 2d 653 (1964)). Even under Justice O'Connor's Duckworth concurrence, the refusal of the police to respect Towne's invocation of his right to counsel is a per se violation of Towne's Fifth Amendment rights which requires suppression.

C. Towne was not given a full and fair opportunity to litigate his constitutional claim in the Florida courts.

Even if this Court decided to rule with Dugger and extend Stone v. Powell to preclude federal habeas corpus review of claims of Miranda violations, there is another reason why the result in the instant case would be unchanged. Towne is

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5/ Ignoring this rule, Dugger again insists here as he unsuccessfully urged below that Towne "expressed his desire to waive his rights." Pet. at 8. The threshold inquiry with regard to waiver of the right to counsel is whether the right to counsel was in fact invoked. Towne v. Dugger, 899 F.2d at 1007. As the interrogating officer in this case failed to clarify Towne's request, the waiver question does not even come into play. That the police repeatedly administered the Miranda warnings after Dugger's equivocal invocation of his right to counsel was made and ignored is irrelevant, for a valid waiver of the right to counsel cannot be established by showing that the suspect responded to further police-initiated questioning. Edwards, 451 U.S. at 484, 101 S. Ct. at 1884.

entitled to have the federal courts consider the violation of his Fifth Amendment rights on habeas corpus because he was not afforded a full and fair opportunity to litigate his claim in the Florida state courts.

In this regard, under the extension of Stone v. Powell Dugger urges, federal habeas corpus review of a state prisoner's claim of a Miranda violation would be precluded only if a full and fair opportunity to litigate the claim had been made available in the state courts. Duckworth, 109 S. Ct. at 2882 (O'Connor, J., concurring). In the instant case, the state trial judge made only a one sentence conclusory finding and did not explicitly address any facts or even mention the equivocal request here. Likewise, the state appellate court that affirmed did not identify or analyze the Fifth Amendment equivocal request for counsel issue on which the Eleventh Circuit reversed.[6/] In the absence of explicit findings or full consideration by the state courts of the constitutional claim on which the Eleventh Circuit reversed, Towne's constitutional claim was not fully and fairly considered by the state courts. Tukes v. Dugger, No. 88-5685, slip. op. at 4786, 4792-93 (11th Cir. Sept. 7, 1990) (no full and fair consideration where the state trial court made no explicit factual findings on the critical question as to whether the

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6/ Instead, both state courts erroneously treated the issue as a waiver of counsel question and employed a "totality of the circumstances" test. That test is inapplicable to the equivocal request issue the federal courts addressed. Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988).

accused made a request for counsel that should have been honored by the interrogating officer, and the state appellate court did not explicitly address the question at all); Agee v. White, 809 F.2d 1487 (11th Cir. 1987) (no full and fair consideration where the state appellate court did not specifically address constitutional claim). Because the critical facts and issues were not explicitly considered by the state courts, even under the extension of Stone Dugger proposes, Towne's habeas corpus petition was properly heard by the federal trial and appellate courts.

II. DUGGER'S ARGUMENT THAT THE RULING OF STONE V. POWELL SHOULD BE EXTENDED TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW OF CLAIMS OF MIRANDA VIOLATIONS IS NOT PROPERLY BEFORE THE SUPREME COURT FOR REVIEW.

Because the argument was not presented to the district court, the Eleventh Circuit held Dugger's contention that Stone should be extended to preclude federal habeas review of claimed Miranda violations was not properly before it on appeal. Towne v. Dugger, 899 F.2d at 1111 n.3. Dugger now argues the Court of Appeals erred in refusing to entertain his Stone contention because Duckworth was not issued until after the entry of the district court's order, so that Dugger did not have the opportunity to raise the point until after the case was already on appeal. Pet. at 11 n.3. This identical argument was made by Dugger in his petition for rehearing to the Eleventh Circuit. The Court of Appeals implicitly rejected it when it denied Dugger's petition.

Dugger's argument for extending Stone v. Powell necessarily has its genesis in Stone itself, which was decided in 1976, twelve years before Towne filed his pro se petition for a writ of habeas corpus. As Dugger's own petition shows, Pet. at 11 n.3, the claim that Stone should be extended to Miranda claims is neither new nor novel. The issue has been discussed for many years. It was identified in two 1977 decisions of this Court, Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) and Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), which both predate Towne's petition by nine years. Further, two years before Towne filed his habeas petition, in Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985), the Eleventh Circuit rejected the exact same extension of Stone Dugger now advances.

In short, Stone v. Powell and cases addressing the question of its extension to bar federal habeas review of Miranda violations were decided years before the federal district judge in this case issued his order denying relief. Justice O'Connor's Duckworth concurrence does not identify a new argument previously unavailable to Dugger. Nor does it constitute a "decision" previously unavailable to Dugger on which a claim of a Rule 10 conflict can be based.

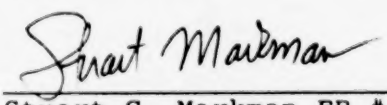
Because the argument was available but not made by Dugger in the district court, Dugger's belated attempt to extend the

rule of Stone v. Powell should be rejected as untimely. Where such procedural snarls exist due to the state's failure adequately to preserve the question presented, the Supreme Court is deterred from granting certiorari. California v. Harris, 468 U.S. 1304, 105 S. Ct. 1, 82 L. Ed. 2d 807 (1984).

CONCLUSION

This case presents neither a conflict with other federal decisions nor an unsettled and important question of federal law. Dugger's petition for Writ of Certiorari should be denied.

Respectfully submitted,



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